

# ‘Mirages of an intellectual dreamland’? *Ratio, obiter*, and the textualization of international precedent

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## I. Introduction: Making friends in Geneva

Karl-Heinz Böckstiegel recounts an anecdote related to an ICCA conference held in Geneva in 2011.<sup>1</sup> In his words,

... investment arbitration should and does contribute to the further development of international law. Some will remember that esteemed colleagues like Emanuel Gaillard feel strongly that arbitral tribunals should make efforts in this regard when writing their awards. But some may also remember that I expressed the opinion, which I still hold today, that we should be very much aware that arbitral tribunals receive their authority and mandate from the parties and institutions which appoint them for the case at hand. And that mandate is to decide on the relief sought, and to consider all factual and legal issues relevant for that decision, no less, but also no more. When I ventured to simplify this approach by saying: 'There are too many professors in arbitration', I did not make friends with everybody in the audience.<sup>2</sup>

A few years later, and a few hundred meters down Avenue de France, a different scenario played out. Dissatisfied with the performance of the WTO Appellate Body, the US blocked the reappointment of one of their members, Seung Wha Chang.<sup>3</sup> One of the justifications given was his participation to the drafting of a number of Appellate Body Reports that, according to the US, had gone too far. This point has long been a concern of the US with regards to their participation in the WTO. In the Annual Report issued by the US Trade Representative in late 2017 an entire section is devoted to the tendency of the AB to 'Issu[e] Advisory Opinions on Issues Not Necessary to Resolve a Dispute',<sup>4</sup> and the seriousness of the concern is demonstrated employing the rather extraordinary technique of quantitatively determined what can only be called the '*ratio-to-obiter ratio*'. Spelling it out, the example may be recalled of the *Argentina – Goods and Services* AB report, which was found by American official to consists, for two-thirds of its length, of asides, considerations unnecessary for the solution of the dispute at issue.<sup>5</sup>

These examples have more in common than a view on the lake. They both constitute the expression of a specific type of unease, one prompted by the uncertain boundaries of the international judicial function. On the one hand, there is the question of what should be said by the adjudicator resolving a given dispute. On the other hand, the problem concerns the use of previous pronouncements by future international adjudicators: is there a limit? Böckstiegel's remarks, though made tongue-in-cheek, are testament to the concern shared by many arbitration professionals to be seen as carrying out their function within the strict limits of their mandate. Real public concerns about the enormous concentration of power in the hands of arbitrators sitting on tribunals capable of striking down regulatory measures of sovereign states are hardly an incentive for appearing engaged in a quasi-professorial process of development of the law. The resolution of narrowly-defined disputes has the potential to appear more acceptable and, perhaps most

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<sup>1</sup> KH Bockstiegel, 'Commercial and Investment Arbitration: How Different Are They Today?: The Lalive Lecture 2012' (2012) 28 *Arbitration International* 577, 588.

<sup>2</sup> *ibid.*

<sup>3</sup> 'United States Blocks Reappointment of WTO Appellate Body Member' (2016) 110 *American Journal of International Law* 573; 'EJIL: Talk! – The USA and Re-Appointment at the WTO: A "Legitimacy Crisis"?' <<https://www.ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis/>> accessed 11 May 2018.

<sup>4</sup> The President's 2018 Trade Policy Agenda, 27.

<sup>5</sup> Statement by the United States at 9 May 2016 DSB Meeting, <https://geneva.usmission.gov/wp-content/uploads/2016/05/May-9-DSB.pdf>.

importantly for those who seek reappointment, less like a personal instance of overstepping.<sup>6</sup> In the context of the resolution of trade disputes, the idea that the ‘crown jewel’ of the multilateral trading system might, contrary to its mandate,<sup>7</sup> ‘add to or diminish the rights and obligations provided in the covered agreements’ sounds worrisome to some actors, especially in light of the virtually perfect level of compliance with its decisions and the development of a nascent doctrine of precedent. Since both the panels and the Appellate Body appear to take previous reports quite seriously,<sup>8</sup> and the Appellate Body is very likely to reverse on appeal panel reports that depart from its interpretation, it is understandable that WTO members could be concerned by jurisdictional and jurisprudential overreach.

Much, though not all, of the discussion may be seen as hinging on the traditional (if legal culture-specific) distinction between *ratio decidendi* and *obiter dicta*. The traditional view in the common law—where a formal, and conventionally ‘rigid’, doctrine of binding precedent is understood to operate, albeit almost never with the rigour ascribed to it by civil lawyers—is that only *rationes* (what was decisive to the resolution of a given case) may bind future courts. *Dicta* are just incidental statements, which may have a degree of persuasion, but no binding force on their own. In international adjudication, just like domestic courts, *dicta* elicit unease because they offer a channel for conveying ideas that is less constrained by—and, by definition, has no relevance to—the actual resolution of the dispute.<sup>9</sup> Because they can be pronounced on virtually anything, they do not follow the parties’ delimitation of the central legal question through pleadings. Regardless of the degree of control exercised by the parties on the dispute settlement mechanism,<sup>10</sup> they are, at best, a known-unknown. Only remotely connected to the solution of the case at issue, they are nonetheless *said*, if not decided. A later adjudicator will thus have to deal, as Oliphant put it, with these ‘mirages of an intellectual dreamland’.<sup>11</sup>

What is worse, the *ratio/obiter* distinction is also complicated by the lack of theoretical clarity on the idea of authority from previous decisions in international adjudication. The orthodoxy on the topic is needlessly anchored to the sacramental fiction of the theory of sources, or to the analysis of fundamentally neutral statutory frameworks.<sup>12</sup> General legal theory, too, is generally taken as providing little help in

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<sup>6</sup> Recall René-Jean Dupuy’s remorse over the *Texaco Award* (‘I penned the award as a professor, not as a judge’). See *Five Masters of International Law: Conversations with R-J Dupuy, E Jimenez de Aréchaga, R Jennings, L Henkin and O Schachter* (Hart Publishing 2011).

<sup>7</sup> See WTO Dispute Settlement Understanding, Articles 3.2 and 19.2.

<sup>8</sup> Raj Bhala, ‘The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)’ (1999) 9 J. Transnat’l L. & Pol’y 1, Among the many scholarly works addressing this point see; Bhala, ‘The Precedent Setters’; Raj Bhala, ‘Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)’ (2000) 33 Geo. Wash. Int’l L. Rev. 873; Krzysztof J Pelc, ‘The Politics of Precedent in International Law: A Social Network Application’ (2014) 108 American Political Science Review 547; Joost Pauwelyn, ‘Minority Rules: Precedent and Participation before the WTO Appellate Body’ in Joanna Jemielniak (ed), *Establishing Judicial Authority in International Economic Law* (Cambridge University Press 2016).

<sup>9</sup> Compare Zachary Douglas, ‘Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?’ (2010) 25 ICSID Review 104, 107.

<sup>10</sup> Consider the arguments presented in Eric A Posner and John C Yoo, ‘Judicial Independence in International Tribunals’ [2005] California Law Review 1.

<sup>11</sup> Herman Oliphant, ‘A Return to Stare Decisis’ (1928) 14 American Bar Association Journal 71, 107. One may also want to recall superbly insightful, if less lyrical, comment of Lord Bowen, in whose view *dicta*, ‘like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them’. See *Cooke v. New River Company* (1888), L. R. 38 C. D. 70.

<sup>12</sup> Article 38(1)(d) of the Statute of the International Court of Justice provides that ‘[t]he Court shall apply ... subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as

practice by portraying precedent as something very complex and very simple at the same time: very complex, because of the great many problems that arise from the construction of a concept, as well as from the many theoretical approaches that can be used in the attempt to provide a satisfactory account of the phenomenon; very simple, too, because precedent is described at the maximum level of abstraction, the troubles of taking the analysis from the world of ideas to the courtroom being mostly unaddressed. In the real world: a precedent may have several *rationes*, there may be hierarchical questions that limit its strength, and persuasiveness and bindingness may be based on a variety of other factors. Finally, what the *ratio* is might not matter at all: the way something was said—*rectius*: written—rather than decided in a previous case, might carry the day.

These considerations provide the starting point for this article, which seeks to provide a fresh appraisal of the *ratio / obiter* distinction and its significance in the context of international adjudication and arbitration. Rather than starting from specific assumptions connected to the common law / civil law divide, it seeks to frame the issue within the problem of the doctrine of precedent (at the theoretical level and in international law) and formulate hypotheses (Part II), further providing an assessment of the practice of international adjudicators on this point (Part III), and ultimately resituating by considering different accounts of how things may be accomplished by using previous decisions (Part IV).

## II. Problematizing dicta

### A. Scope and rationale of the putative obligation to follow precedent: A quick theoretical primer

There are at least four models—or, as some may argue, three and a half—which may be said to describe the ways precedent may prompt respect by a future decision-maker. Let us consider them briefly to clarify the arguments that will be addressed later, with the caveat that what follows is a nothing more than a very simplified account among the many that could be considered.

- a) In the first, weakest model the later adjudicator is not concerned—at all—with the quality of precedent of the previous decision. To the extent that the argument is convincing, she can employ it because it is persuasive. There is, with the qualifiers that will be considered *sub d*), no obligation to do so. When this model is followed, the previous decision is not, strictly speaking, a precedent at all, or, at least, it is a precedent that has more to do with the substantive reasons of a decision than with its authoritative source;<sup>13</sup>
- b) The second model, which may be called the *epistemic*, is based on the idea of deference to past authorities who are understood to know what the law is. A decision of the ICJ, a body comprising fifteen most highly qualified individuals representing the legal cultures of the world, taken after careful consideration of the available legal sources and hearing the arguments of skilled counsel on both sides, is understood to command respect. This provides a basis for the practice of following it, but allows limitations dictated by common sense. It is perhaps with this in mind that

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*subsidiary means* for the determination of rules of law' (emphasis added), while Article 59 provides that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'. There is ample consensus that Article 59 was neither introduced for, nor necessarily entails, a prohibition on the operation of a doctrine of precedent of some kind: for the most celebrated version of this argument, see M Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 1996) 99–100.

<sup>13</sup> Frederick Schauer, 'Authority and Authorities' [2008] *Virginia Law Review* 1931, 1943.

Lauterpacht spoke of the product of arbitral jurisprudence as ‘a body of precedent which is full of instruction and authority’;<sup>14</sup>

- c) The third model boils down to *practical reasons*. Precedent may be followed for reasons including, but not limited to, efficiency, ensuring consistency, stabilizing expectations, improving the adjudicator’s cognition of the law, and bolstering a court’s legitimacy.<sup>15</sup> In this context, the idea of practical reasons encompasses consequentialist arguments.<sup>16</sup> Note that all these rationales may support, but are not inherently connected to, the establishment of a *rule* of precedent.
- d) Finally, a precedent may be followed because a rule so requires—a rule, it bears noting, that may amount to the legal translation of the views listed *sub a)*, *b)*, and *c)*. If, and when, this is the case, the question becomes one of determining the breadth of the scope of the obligation to follow precedent. In Anglo-American law one of the pillars of this exercise is the quest for the determination of the *ratio decidendi* of a judgment, which is, truly, its only part capable of constraining the later adjudicator. It is this peculiarity that makes it possible for certain theorists to entertain the fallacy that cases have *rationes* only where a positive obligation to follow prior decisions exists.<sup>17</sup>

Most theoretical accounts concerning precedent in international adjudication focus on one or more of these aspects separately, but generally fail to account for the complexity of the precedent-application phenomenon. While this attitude is the product of several reasons, the claim made here is that judicial decisions are generally perceived as important in the resolution not just of disputes, but—and the difference is material—of specific legal questions too. Accordingly, different players often comment on the need to limit the influence of precedent, just like they would do where a doctrine of binding precedent operates. By doing so, however, they import biases and methodologies typical of one specific system into one that does not accept the latter’s premises.

### **B. Scope and rationale of the putative obligation to follow precedent: *Ratio, obiter*, and the quest for intellectual rigour**

International adjudicators are sometimes criticised on account of a lack of rigour in identifying the *ratio* of a certain decision and thus deciding on what is said to be a shaky basis. This type of criticism, when taken in isolation, may be found convincing. The problem of these arguments, however, is that they tend to assume that only one way of reasoning with prior decisions exists. To make the accusation more unambiguous, and summarise the argument made in this section, the trouble is that they attempt to clinically and artificially isolate the question of the scope of the authority to follow precedent from the question of what any use of precedent aims to pursue, with little regard for both the existing relevant rules on international adjudication and judicial and arbitral practice.

The discussion in the next section examines three superbly crafted examples of such criticism, both approaching the question from similar premises and ultimately reaching similar conclusions. While they

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<sup>14</sup> Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Praeger 1958) 17.

<sup>15</sup> An expanded discussion is offered in Frederick Schauer, ‘Precedent’ (1987) 39 *Stanford Law Review* 571, 579.

<sup>16</sup> For a general overview of consequentialist justifications for precedent see Neil Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 153.

<sup>17</sup> *ibid* 71 (Discussing the practice of the CJEU.); For a critique of this argument, see Jan Komárek, ‘Reasoning with Previous Decisions: Beyond the Doctrine of Precedent’ (2013) 61 *The American Journal of Comparative Law* 149, 157.

serve our analysis well from this point of view, it must be observed that they, too, represent an oversimplification of a rather complex problem. Separating the *ratio* from *obiter dicta* is a difficult endeavour, and many approaches are possible for cases more complicated than the rather clear-cut examples that will be presented in these examples and the analysis that follows.

### 1. Paulsson's view of the decision-making function

One of the most compelling and articulated treatments of precedent in international investment arbitration has been offered, with the usual clarity of thought, by Jan Paulsson in a well-hidden essay.<sup>18</sup> The discussion hinged on what he perceived as an example of lack of rigour by international arbitrators, which he addressed with a relatively straightforward argument. Assume that an award contains the proposition that an investment satisfies both the ICSID Convention *and* the BIT definitions of investment.<sup>19</sup> If the award is taken as a precedent, can the proposition that 'an investment must satisfy both definitions' serve as its *ratio if the claim is upheld*? Paulsson's answer is a resolute 'no': it is only *ratio* if the claim is dismissed because it failed under one ground and the tribunal states that the result under the other ground is immaterial.<sup>20</sup> This is but a version of the argument whereby what matters is 'the rule as used rather than the rule as stated'.<sup>21</sup>

Leaving aside for the moment the question of whether this is a tenable version of the concept of *ratio*,<sup>22</sup> it must be observed Paulsson's approach is not naively outcome-driven. It is predicated on the idea that any version of precedential constraint by a prior decision must be an expression of its decision-making function, which, he contends, is only 'exercised when a tribunal upholds or denies a claim'.<sup>23</sup> Accordingly, he calls for more rigour on the part of international arbitrators who may often decide a case on the basis of something that does not quite satisfy this test.

### 2. Jennings and the *Mavrommatis* test

These considerations are not novel in the field of international law, and are in fact quite similar to analogous concerns advanced by Jennings in his plea for learning from common lawyers.<sup>24</sup> Speaking of the practice of the ICJ, Jennings complained of a lack of intellectual discipline which seemed to affect even the World Court, which was not 'above citing passages from previous judgments almost as if any pronouncement by the Court may be cited, not because it embodies the decision in the case but because it is a passage that has become hallowed into something akin to Holy Writ'.<sup>25</sup> He gave a celebrated example, the illustrious *Mavrommatis dictum*, in which the PCIJ articulated what has served, and still

<sup>18</sup> Jan Paulsson, 'The Role of Precedent in Investment Arbitration' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2010).

<sup>19</sup> ICSID Convention, Article 25(1).

<sup>20</sup> Paulsson (n 18) 705–6 It is possible to entertain the argument that any discussion of failure or success under the second ground would simply be immaterial and thus *obiter*.

<sup>21</sup> John Gardner, 'Some Types of Law' in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press 2007) 68–70.

<sup>22</sup> Rupert Cross and JW Harris, *Precedent in English Law* (4 edition, Clarendon Press 1991) 72; It may be worth adding that Paulsson concedes that his conclusion may be unpalatable. See (n 18) 705.

<sup>23</sup> Paulsson (n 18) 705.

<sup>24</sup> RY Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *The International and Comparative Law Quarterly* 1, 9.

<sup>25</sup> *ibid* 10.

largely serves, as a test for the definition of what a dispute is.<sup>26</sup> The formulation was rather abstract, and, if Paulsson's test is to be applied, even unnecessary for the decision itself, thus not qualifying as the *ratio* of the case. What is more, it is highly questionable whether the definition may still be considered formally correct today—or at the time of Jennings's writing, for that matter. Neither weakness, however, has prevented the quotation of the passage as an instance of 'established case law' in twenty-nine ICJ cases over sixty years.<sup>27</sup>

### 3. *The hero of the common law at the ICJ: Judge Read and the Anglo-Iranian Oil Co. Case*

In *Anglo-Iranian Oil Co.* the case hinged on the interpretation to be given to the Persian declaration of acceptance of the jurisdiction of the Court. Judge Read took issue with the majority Judgment, arguing that its restrictive interpretation of the jurisdictional clause was not appropriate. Read did not find direct support for his contrary view, but did not omit—perhaps in keeping with his past at the Canadian bar<sup>28</sup>—to disclose and address putative adverse authorities.<sup>29</sup> These rather directly contradicted his claim, supporting the majority, but were not, in his view, *true precedents*: in fact, the decisions he referred to were mere *dicta*, statements that did not constitute the basis of a decisions of the Court.<sup>30</sup> In his view, these dicta did not provide authority for the proposition that it was possible to interpret a jurisdictional clause narrowly. On the contrary, they provided evidence *that the Court had never based a decision* on this point. To bring the point home, he observed that

Article 38 of the Statute is mandatory, and not discretionary. It requires the Court to apply judicial decisions as a subsidiary means for the determination of rules of law. The expression "judicial decisions" certainly includes the jurisprudence of this Court and of the Permanent Court. I have no doubt that it includes the principles applied by the Court as the basis of its decisions. It is, however, equally clear that it cannot possibly be construed as requiring this Court to apply *obiter dicta*.

This paragraph seems paradigmatic of a certain attitude to precedent, and indeed it has been criticised for being overly common-lawyerly.<sup>31</sup> Judge Read was—correctly—pointing out that the Court cannot choose not to apply the sources listed in Article 38. For judicial decisions, however, this only meant that facing the past could not be avoided, not that the past always carries the same weight.

### C. The judicial function: The basis of a rule of precedent-recognition?

The problem with these approaches is that intellectual rigour might be beside the point. What is concealed behind them—or under the cloak of judicial propriety—is the claim that something akin to an embryonic

<sup>26</sup> PCIJ Series A, No. 2, p. 11.

<sup>27</sup> Starting with *Ambatielos* (Merits), Judgment of May 19th, 1953: ICJ Reports 1953, p. 10 and ending with *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 833.

<sup>28</sup> Shabtai Rosenne, 'Judge John E. Read and the International Court of Justice' (1980) 17 Canadian Yearbook of International Law / Annuaire canadien de droit international 3.

<sup>29</sup> Different jurisdictions vary widely in terms of duties imposed on counsel to deal with adverse precedent, with the American legal system being perhaps the one where the duty to disclose such authorities is most extensive.

<sup>30</sup> Ibid. ('In support of the contention that a restrictive interpretation should be applied, it is possible to cite certain obiter dicta of the Permanent Court'.)

<sup>31</sup> Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Second Edition, Oxford Commentaries on International Law 2012) 855.

form of rule of recognition, and, specifically, a rule of *precedent-recognition*, should exist.<sup>32</sup> In this particular context, this is done by insisting that focus should be placed on the *ratio*, so that only that can be properly taken into account and assigned precedential value. In other words, the authority of a precedent in supporting a proposition is thought to be a function of its decisiveness in the solution of a prior case. In Paulsson, Jennings, and Read's view, every other use of prior decisions amounts to something that does not quite qualify as a reasoning by precedent.

To an extent, this attitude is circular because it merely applies one of the many possible versions of a theory of precedent instead of constructing one from the ground up, that is to say, from the analysis of the current practice. Incidentally, it applies a theory predicated on the generally binding effect of decisions by the precedent adjudicator on the present, which is unlikely to resemble the model that international law is understood to have adopted, and it does so by applying constructs that have been developed precisely to, *inter alia*, soften the effects of the obligation to follow previous judgments.<sup>33</sup> The account is a normative one and appears to be based on three distinct elements: first, the idea that it is the decision-making function that makes a pronouncement authoritative; second, an entrenched idea of the judicial function as dispute-settlement, and not system-building, oriented; third, it is submitted, a fascination with the common law tradition.<sup>34</sup>

Leaving aside for the moment the third point, where does this idea come from? Though it is open to debate whether the sources invoked in support of this proposition actually contain any compelling indicia on this point, the issue can be easily traced back to the idea that the function of deciding international disputes must be subject to hard external limits, which serve as a bulwark against judicial legislation.<sup>35</sup> To emphasize the concept of the judicial function amounts to endorsing and expressing a positive judgment on the characteristic features of that activity. Restraint and mindfulness of the judicial role are traditionally held as key to the optimal performance of this function, for states, one oft-adopted model proposes, delegate it to international courts for a number of reasons, none of which, according to traditional accounts, are expected to result in the creation of new law.<sup>36</sup> Needless to say, different accounts of the judicial function

<sup>32</sup> I rely on Siltala's account of Hart's theory of law. See *A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law* (Hart Publishing 2000) 163. This approach is not to be confused with the one adopted by Tai-Heng Cheng in his 'Precedent and Control in Investment Treaty Arbitration' (2007) 30 *Fordham International Law Journal* 1024.

<sup>33</sup> Douglas (n 9) 107. This does not mean that drawing the distinction between *ratio* and *obiter* is 'to accept the doctrine of *stare decisis*, at least at the theoretical level' though Professors Cross and Harris may disagree: (n 22) 17.

<sup>34</sup> On the anecdotal level, common lawyers are quick to criticise different models. For example, consider Roger Alford's comment on the 'far inferior' quality and 'deficient ECJ drafting' in 'Opinio Juris » Blog Archive The Inferior Quality of ECJ Decisions - Opinio Juris' <<http://opiniojuris.org/2007/10/31/the-inferior-quality-of-ecj-decisions/>> accessed 5 April 2018. Although it is generally true that most statements concerning the *ratio* / *obiter* distinction are the product of common law-educated judges, there are notable exceptions. Shahabuddeen makes the example of Judge Anzilotti's dissent in *Interpretation of Judgments No. 7 & 8 (Factory at Chorzow)*, P.C.I.J. Series A, No. 13, p. 23. However, as Jennings himself correctly remarks, Anzilotti's words referred to *res judicata*, rather than anything else: see Jennings (n 24) 11.. A more apt comparison is probably to be found in Judge Kreća's separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, at 489, para 64 ('The position of the arbitral tribunal appears to be an *obiter dictum* rather than a precedent *stricto sensu*'). On a broader level, the fascination with the common law tradition may also be a product of the 'patterns of dominance' discussed by Anthea Roberts: see *Is International Law International?* (Oxford University Press 2017) *passim*.

<sup>35</sup> 'A judge's incautious *obiter dictum* might by simple repetition become binding on future generations'. See Alan Harding, *A Social History of English Law* (Peter Smith 1973) 357.

<sup>36</sup> The traditional orthodoxy has been challenged. For a stream of the debate, see Posner and Yoo (n 10); Laurence R Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' [2005]



may differ on this point, though they may not reach the extremes of the polar opposites of Lauterpacht's plea for exhaustiveness<sup>37</sup> and the *Glamis Gold* Tribunal's system-agnosticism.<sup>38</sup>

Without attempting to trigger the ire of scholars in interstitial law-making,<sup>39</sup> it certainly does not follow from the above that an incidental observation which happens to state the law in a straightforward and uncontroversial manner would amount to retrospective judicial legislation, with dangerous implications to follow.<sup>40</sup> Symmetrically, references to such statements by future judges, as Lauterpacht put it, could never be prohibited by any statutory provision.<sup>41</sup> There is thus a difference between the acknowledgment of the persuasive value of a statement and deference to its author. The risk of confusing the boundary, however, may warrant the rule that only the *ratio* should bind, and that decisions not approaching the use of precedent with the necessary rigour should be censured. It would not be difficult to justify one such rule. The problem is that *it is yet to be established* whether one such rule, be it a rule of law or—provided that a different is material—a rule of practice,<sup>42</sup> operates.

Note that one such rule could also be based on different justifications. For example, on the consequentialist level, restricting the potential of reliance to *rationes* only may allow for a better protection of the legitimate expectations of actors within the systems—assuming that what tribunals *have done* will be clearer than what tribunals *have said*; following an epistemic—or proficiency-driven—model, *rationes* are more likely to have arisen from the extensive confrontation of the parties' counsel and the tribunal,<sup>43</sup> though examples to the contrary abound.<sup>44</sup> Ultimately, however, to hold that *dicta* have less value amounts to tying the legal correctness of a proposition not just to the actor that has pronounced it, but also to how and which context the proposition was pronounced to begin with. Satisfaction of the second leg of this test would be 'not just relevant to legal correctness, but constitutive of it'.<sup>45</sup>

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California Law Review 899; Laurence Helfer and Karen Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' [2013] Theoretical Inquiries in Law.

<sup>37</sup> Lauterpacht (n 14) 61.

<sup>38</sup> *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009. See the comment in W Michael Reisman, "Case Specific Mandates" versus "Systemic Implications": How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture' (2013) 29 Arbitration International 131.

<sup>39</sup> Recall Holmes J in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), at 221. ('I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.')

<sup>40</sup> A concern echoing Swift's preoccupation in the oft-quoted passage from *Gulliver's Travels*: 'It is a maxim among these lawyers, that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind'.

<sup>41</sup> Lauterpacht (n 14) 22; Randy J Kozel, 'The Scope of Precedent' (2014) 113 Michigan Law Review 179, 185, arguing that '[a] judge is always free to consider a prior statement for its persuasive value, even if she regards the statement as dispensable dicta. Looking to a proposition for its persuasive force is a means of vetting the merits of a legal argument'.

<sup>42</sup> HLA Hart, *The Concept of Law* (Penelope A Bulloch and Joseph Raz eds, 2nd edn, Clarendon 1997) 120 ff.

<sup>43</sup> Neil MacCormick, 'Why Cases Have Rationes and What These Are' in Laurence Goldstein (ed), *Precedent in Law* (New edition edition, Clarendon Press 1991) 170.

<sup>44</sup> For a discussion of the evidence that the concept of *erga omnes obligations* was addressed in a constructive discussion in the *Barcelona Traction* proceedings, see Maurizio Ragazzi, 'The Appearance of the Concept of Obligations Erga Omnes on the Agenda: The Dictum of the International Court in the Barcelona Traction Case' (Oxford University Press 2000) 10 <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198298700.001.0001/acprof-9780198298700-chapter-1>> accessed 6 April 2018 ff. Indeed, 'as so often happens, a cryptic statement in a judgment proves to be a reply to or refutation of an argument in a judge's appended opinion, and may be virtually unintelligible or even misleading taken in isolation': HWA Thirlway, *Non-Appearance before the International Court of Justice* (Cambridge University Press 1985) 107.

<sup>45</sup> Richard M Re, 'Narrowing Supreme Court Precedent from Below' (2015) 104 Georgetown Law Journal 921, 936.

The question, then is whether one such rule has actually found its way into the realm of international adjudication. If it has, it may function as a controlling device for careless precedential reasoning, allowing the critique of poorly grounded awards and the commination of some type of sanction, be that linked to the fate of the decision or that of the decision-maker's.

### III. The ratio / obiter distinction, according to international adjudicators

In practice, the distinction between *ratio* and *obiter* is only occasionally made overtly by international adjudicators. Very few mentions of these concepts may be found in the jurisprudence of the ICJ, and the same may be said of the practice of other international tribunals. The following three sections closely examine the practice of the ICJ, the WTO Appellate Body, and investment arbitration tribunals to provide a discussion of their approach to the issue.

#### A. The ICJ

The distinction between ratio and obiter was only made expressly in a handful of cases within the Court's majority opinions. Beyond the *Judgment No. 333 Advisory Opinion* cited above, the Court only mentioned concept of *obiter* expressly—and very puzzlingly—in its 2007 Judgment in the *Bosnian Genocide* case.<sup>46</sup> The Court stated that 'it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all'.<sup>47</sup> To an extent, this statement represent an express recognition of the concept of *obiter*, but its importance cannot be overstated as the Court was concerned with the very narrow question of determining what had been decided with binding force with respect to the parties—in other words, with the question of *res judicata*.<sup>48</sup> It is doubtful that the distinction was intended to have implications stretching beyond that point. This may also find a degree of confirmation in the fact that, in the rare instances when the Court discussed the specular notion of *ratio decidendi*, it did so with references to prior judgments intervened between the same parties which it was called upon to examine.<sup>49</sup> Overall, this remains a matter of confusion in the jurisprudence of the Court, which may perhaps be traced back to the perplexing legacy of Judge Anzilotti's distinction between 'essential and non-essential grounds'.<sup>50</sup>

The distinction has been made far more often by individual judges, but it is submitted that inconsistencies in their observations make it difficult to establish a shared institutional understanding. That having been

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<sup>46</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p.43,

<sup>47</sup> *Ibid.* at 53, para 126.

<sup>48</sup> For an up-to-date review of the problems associated with the principle, see Niccolò Ridi, 'Precarious Finality? Reflections on Res Judicata and the Question of the Delimitation of the Continental Shelf Case' [2018] *Leiden Journal of International Law* 1.

<sup>49</sup> *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12, at 23, para 28. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*Tunisia v. Libyan Arab Jamahiriya*), Judgment, ICJ Reports 1985, p. 192, at 220, para 51; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Reports 1992, p. 350, at 401, para 252; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, ICJ Reports 1995, p. 288 At 294-5, para 22; *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening)* (*El Salvador v. Honduras*), Judgment, ICJ Reports 2003, p. 392, at 403, para 33.

<sup>50</sup> *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow)*, 1927, PCIJ, Series A, No. 13, p. 2, at 24.

said, the technique is quite common. For example, Judge Spender interestingly imported the distinction in the context of advisory jurisdiction in *Certain Expenses*,<sup>51</sup> arguing that statements made in the *Competence of the ILO* Opinion, delivered by the PCIJ, were not to be relied on because they were made after ‘the Court had already arrived at its conclusion’.<sup>52</sup> And yet, judges from different traditions see *obiter* observations differently. Judge Cançado Trindade, too, has qualified them as statements *supporting* the *ratio* to be included for reasons of exhaustiveness. Judge Owada has objected to the use of the *Mavrommatis dictum*, not as such, but because of the Court’s worrisome practice of elaborating upon it too creatively. Other times yet, a close reading of the decisions seems to reveal that these terms may have been used in a rather imprecise manner. Absence of evidence notoriously does not amount to evidence of absence, but it does seem difficult to argue that the *ratio/obiter* distinction carries much weight in the Court’s case law.

Apparent contradictions, of course, exist. The legacy of the Permanent Court’s Opinion in *Eastern Carelia* is an interesting example. As is well known, the case is generally understood to establish the principle that advisory opinions may not be used in such a way that would circumvent states’ consent. However, it has also been contented that the central and ultimate ground for the decision struck directly at the lack of competence of the Council of the League of Nations to request an opinion involving a state that was not a member of the League itself.<sup>53</sup> The point was used as a matter of critical distinction for the disapplication of *Eastern Carelia* in the *Namibia* Opinion. Indeed, a common, and more modern,<sup>54</sup> reading of *Eastern Carelia* is that membership to the Council of the League would have been sufficient, in any case, for the Court to issue an opinion.<sup>55</sup> Though the relationship between these two cases may look like a suitable example, the grounds for the refusal of the *Carelia* opinion and the principle it established—namely, membership of the League and consent to the Court’s jurisdiction—were substantially one and the same, though formally distinct. The contradiction discussed here, therefore, remains apparent: it is but an instance of a Court’s *dictum* clarifying the principle applied in the case, and the story of the subsequent interpretation of its import.

## **B. Investment arbitration: Everything counts?**

Speaking of *ratio* and *obiter* has been more common in international investment arbitration. Specifically, there are at least 59 decisions that mention the distinction. In a landmark empirical article on the legal reasoning of ICSID tribunals, Fauchald observed that the arbitrators appeared to be relatively impervious to arguments based on the distinction.<sup>56</sup> The situation is somewhat different now in that mentions are even more common, but there does not seem to be a major difference in the treatment of statements made *obiter*. In *Berschader v. Russia*,<sup>57</sup> an SCC Tribunal could discuss the *Plama* precedent saying that

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<sup>51</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion. 20 July 1962 [1962] ICJ Reports 151.

<sup>52</sup> *Certain Expenses*, supra n51, at 192-3 (Dissenting Opinion of Judge Spender).

<sup>53</sup> See the discussion in Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press 2005) 160 ff.

<sup>54</sup> Beyond *Namibia*, the point is expressed clearly in *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12, at 15.

<sup>55</sup> Spiermann (n 53) 172-3.

<sup>56</sup> Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 *European Journal of International Law* 301, 315.

<sup>57</sup> *Vladimir Berschader and Moïse Berschader v. Russian Federation*, Case No. 080 2004, Award, 21 April 2006.

Since the Tribunal had already upheld its jurisdiction under the ECT, the tribunal's decision with respect to its jurisdiction under the BIT was essentially *obiter dicta*. The issues discussed by the Tribunal in relation thereto are, however, of direct relevance in the instant case.<sup>58</sup>

This conclusion was found wanting by Arbitrator Weiler in his dissent, where he declared that the precedent should have been deemed 'not persuasive because the reasoning was not dispositive of the final award'.<sup>59</sup> Six years later, the *Burlington v. Ecuador* tribunal cautiously endorsed the respondent's view that 'everything counts'.<sup>60</sup> The tribunal restated its belief of having a duty to harmoniously contribute to the development of international law and promote a predictable legal order and that

In this light, there is no reason to distinguish between *obiter dicta* and holding. Whether peripheral or central to the decision, the statements of an international investment tribunal may provide guidance to investors and host States alike, and may serve to predict the decisions of future tribunals.<sup>61</sup>

The *Caratube II* tribunal dealt with yet another problem, that is to say, the weight to be given to the determinations of the *Caratube I* tribunal.<sup>62</sup> The claimants had insisted that the tribunal in the new claim should not be bound by determinations made *obiter* by previous one.<sup>63</sup> The question, however, straddled the distinction between the issue of precedent and that of *res judicata*, ultimately the basis of the problem as resolved by the tribunal.<sup>64</sup> Perhaps one of the most paradigmatic endorsements to date is to be found in the jurisdictional phase of *Murphy Exploration v Ecuador*, where the tribunal stated quite vocally that Claimant's dismissive attitude towards an incidental statement was not justified and found that 'the Enron tribunal wanted to include that statement in its Decision precisely because of the importance it attributed to the issue', even if it was not an essential and dispositive one.<sup>65</sup>

Instances to the contrary conclusion do exist, though it is often difficult to ascertain if the quality of *obiter* alone was enough to determine unpersuasiveness. By way of example, in *European American Investment Bank v. Slovak Republic*,<sup>66</sup> the value of *Berschader* as a precedent was curtly dismissed, because 'the relevant part of the award is *obiter* and contains no reasoning not set out in the other awards reviewed above'.<sup>67</sup> In the *Yukos* final award the Tribunal observed that it agreed with the proposition 'that the principle that an investment "will not be protected if it has been created in violation of national or international principles of good faith" or "of the host State's law" is a general principle'. Yet, the statement was overtly extracted by what 'other arbitral tribunals have stated in *obiter dicta*'.<sup>68</sup> Remarkably, in the next page the tribunal went on to dismiss the authorities cited by respondent because they 'were all made *obiter* and are too vague to

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<sup>58</sup> Ibid. at para 171.

<sup>59</sup> Ibid., dissenting opinion of Professor Todd Weiler, para. 19.

<sup>60</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012.

<sup>61</sup> Ibid at para 221.

<sup>62</sup> *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017.

<sup>63</sup> Id at para 362.

<sup>64</sup> Ibid at para 458-60.

<sup>65</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador* [I], ICSID Case No. ARB 08 4, Award on Jurisdiction, 15 December 2010, para 153.

<sup>66</sup> *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012.

<sup>67</sup> Ibid at para 384 (emphasis added).

<sup>68</sup> Ibid at para 1351.

allow any certain conclusions to be drawn as to their intended meaning.<sup>69</sup> One of the most negative attitudes towards incidental statements can be found in *Quasar de Valores v Russia*,<sup>70</sup> where the tribunal remarked—the reader will note the conceptual and terminological similarity with the observations of Jan Paulsson, who happened to be on the tribunal—as follows:

[t]here are other reasons why alleged precedents may be of limited normative applicability. Quotations of incidental comments are not entitled to be considered as precedents at all; they are not part of the *ratio decidendi* and thus are not part of the reasoning by which the arbitrators fulfil their mandate to decide. That is where they exercise personal responsibility. *Obiter dicta* are commentary. They may be persuasive but are *a priori* of less weight.<sup>71</sup>

Irrespective of whether or not the inclusion of *dicta* is a good or bad thing in investment decision, their use is remarkably difficult to sanction within the system. In the *Lucchetti* annulment proceedings, for example, claimant had taken issue with an ‘inappropriate and irrelevant’ statement made by the tribunal.<sup>72</sup> The Committee took the view that it could not be sanctioned, *precisely* because it was pronounced *obiter*.<sup>73</sup> The apparent paradox is that the very fact that a pronouncement is made *obiter* deprives it from any authority in the instant case, simultaneously making it irrelevant in the solution of the dispute and shielding it from any potential censure.

The framework of annulment may be taken to offer a second interesting insight into the question of the relevance of *dicta*. Under the ICSID rules, it is well understood that the annulment committees do not perform a function of appellate review, only being empowered to censure the impugned award on narrow and rigorously specified grounds,<sup>74</sup> being concerned with the legitimacy of the process, rather than the formal correctness of the award.<sup>75</sup> It is, however, equally well known that many annulment committees have taken the scenic route to exercising this power. By doing so, they have commented extensively on errors in law that could not, under the ICSID framework, lead by themselves to annulment. In some cases, the acknowledgement of the alleged legal irrelevance of the pronouncement on these issues has gone hand in hand with a strong emphasis on the magnitude of the mistakes that were made in the impugned award. The well-known example of the *CMS* annulment proceedings may be recalled at this point: the *ad hoc* Committee abode by the statutory guidelines in refraining from annulling the award on the grounds of its mistaken analysis of the necessity defence. Yet, it did not withhold some remarkably harsh comments on the matter, concluding that if it ‘was acting as a court of appeal, it would have to reconsider the Award on

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<sup>69</sup> Ibid at para 1356.

<sup>70</sup> *Quasar de Valores SICAV S.A. and others (formerly Renta 4 S.V.S.A and others) v. Russian Federation*, SCC Case No. 24 2007, Award on Preliminary Objections, 20 March 2009.

<sup>71</sup> Ibid at para 91.

<sup>72</sup> *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, Decision on Annulment, para 115.

<sup>73</sup> Ibid.

<sup>74</sup> See, for example, the Annulment Committee in *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, opining that ‘[i]t is an overarching principle that ad hoc committees are not entitled to examine the substance of the award but are only allowed to look at the award insofar as the list of grounds contained in Article 52 of the Washington Convention requires’. On unpacking these grounds see generally Emmanuel Gaillard and Yas Banifatemi, *Annulment of ICSID Awards* (Juris Publishing, Inc 2004); R Doak Bishop and Silvia M Marchili, *Annulment under the ICSID Convention* (OUP Oxford 2012); Gabriel Bottini, ‘Present and Future of ICSID Annulment: The Path to an Appellate Body?’ (2016) 31 ICSID Review - Foreign Investment Law Journal 712.

<sup>75</sup> David D Caron, ‘Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal’ (1992) 7 ICSID Review - Foreign Investment Law Journal 21, 24.

this ground'.<sup>76</sup> It would be utterly naïve to suppose that a statement by a committee comprised of two former ICJ Judges—one being a former president—and the Special Rapporteur for the ILC Articles on State Responsibility could, whatever its lack of formal value, go without legacy. Stone Sweet and Grisel cogently argue that this was, indeed, not the case at all, as the Committee's *dicta* were widely referred to in subsequent annulment proceedings,<sup>77</sup> and eventually resulted in the 'destruction' of the entire 'Orrego Vicuña approach'.<sup>78</sup>

To sum up, arbitral practice seems to care little for the distinction. This is so in the case of both other previous awards and, remarkably, annulment proceedings, with the result that the scope of their review becomes significantly broader than the statutory framework would suggest.

### C. WTO Adjudication

As mentioned above, *dicta* are especially political in WTO adjudication, and the object of express condemnation by WTO members. One of the most critical problems in this regard is that the Appellate Body itself appears to employ the notion.

The Appellate Body mentioned the distinction in a number of cases. In *Canada – Periodicals* it expressly qualified a statement made by a GATT Panel to the effect that 'it can reasonably be assumed that a payment not made directly to producers is not made "exclusively" to them'. The Appellate Body qualified this statement as *obiter*, because 'the panel found in that report that subsidies paid to oilseeds processors were not made "exclusively to domestic producers"'. This is an interesting case, because it shows the full force of a strong version of the *ratio / obiter* distinction: since a decision on the first point (whether the payments had been made to domestic producers exclusively) had been taken, any decision on the second (whether a non-direct payment can ever be made exclusively to the receiver) was necessarily incidental and unnecessary—in other words, *obiter*.<sup>79</sup>

Another interesting example may be found in *Argentina – Textiles*, where the Appellate Body had an opportunity to assess the Panel's reliance on a number of GATT panel reports which persuaded it that past GATT practice on the question of whether Article II of the GATT 1994 allowed a Member to apply a type of duty other than that provided for in that Member's Schedule was 'clear'. The Appellate Body dismantled this argument by demonstrating that the issue before the panels in the quoted precedents was not quite the same. As one report in particular contained wording that seemed suggestive of an opposite solution, the Appellate Body felt the need to distinguish the case and supported this reasoning by engaging with it in a footnote, further qualifying such statements as *dicta*.

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<sup>76</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para 135.

<sup>77</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB 02 16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, paras 176, 197, 213-214; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB 01 3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para 405.

<sup>78</sup> Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 163.

<sup>79</sup> In this connection, I am inclined to respectfully disagree with Henry Gao, who interprets this decision as not clarifying why the point was *dictum*: see Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes' [2018] World Trade Review 1, 21.

Three more cases may be of interest. In *US – Gambling* the Appellate Body clarified that it did not need to rule on an observation made by the panel when the panel itself had qualified it as not responding to a specific claim by any parties and qualified it as an obiter.<sup>80</sup> The same reasoning was endorsed in *EC – Fasteners*, where the Appellate Body qualified the Panel's statement that 'that there was an inconsistency in the European Union's arguments' as an '*obiter dictum* that had no material bearing on its ultimate conclusion that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement'.<sup>81</sup> Finally, in *Chile – Price Band System*<sup>82</sup> the Appellate Body considered the propriety of making a *dictum on dicta*.<sup>83</sup> The panel had itself qualified as *dictum* its observation to the effect that 'an Article 21.5 compliance panel may consider a new claim, not raised before the original panel'. The parties to the proceedings disagreed as to whether the issue should have been addressed. Australia and the United States advocated a narrow reviewing power, whereas Canada and the European Communities were in favour of a broad understanding of the role of the Appellate Body, which could have resolved an issue of systemic importance, thus contributing to increased legal certainty.<sup>84</sup> Eventually, however, the Appellate Body chose to avoid the issue by virtue of its refusal to address Argentina's conditional appeal, within the context of which the issue had been raised.<sup>85</sup>

#### D. An interim conclusion

The analysis carried out above shows that there is no real consistency in the understanding of the role and significance of *obiter dicta* in international adjudication. So far, no international tribunal has spelled out a general approach to the issue. Rather, it seems that, in most cases, the distinction is employed argumentatively to undermine claims or the value of legal propositions, or to avoid a decision that may prove controversial, but without any systematic approach. It must be noted that, especially in systems where a rule of binding precedent does operate, creative use of the distinction between *ratio* and *obiter* may be instrumental in occasioning progressive shifts in the development of the law: a wholesale rejection of an approach that modulates its borders is thus not warranted. Yet, it does not appear from the analysis above that it is with this intention that international adjudicators approach this issue, which remains problematically unsystematised. It is with this in mind that the following section provides additional elements for a more critically grounded approach to the distinction.

### IV. A different outlook: Life in the realm of the text

Traditional accounts on ratio and obiter do not fare well when contrasted with the current practice of international courts and tribunals. This section considers alternative heuristics which may provide a more satisfactory explanatory framework.

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<sup>80</sup> Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, circulated 20 August 2007, para 131.

<sup>81</sup> Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China - Recourse to article 21.5 of the DSU by China*, WT/DS397/AB/RW, circulated 18 January 2016, para 5.64.

<sup>82</sup> Appellate Body Report, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products - Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, circulated 07 May 2007.

<sup>83</sup> I borrow this evocative expression from Gao (n 79).

<sup>84</sup> Appellate Body Report, *Chile - Price Band System* (Article 21.5 - Argentina), *supra* n82, paras 85-118.

<sup>85</sup> *Ibid*, para 252.

### **A. The rule as used versus the rule as stated: Komárek's distinctions between case-bound and legislative models of precedent**

Let us go back to Jennings. For all his criticism, the *Mavrommatis* querelle only shows that there is another way to address the issue. Consider, as an example, the argument from consistency for precedential constraint. Is it like cases that should be decided alike, or is it rather the same *legal questions* that should be similarly resolved? The distinction is not normally made in analytical jurisprudence because of the levels of abstraction that characterize the discipline, but it is material to most real-life applications of precedent. There can be little argument that in the example discussed above, relating to the notion of investment, a finding that the claim may be entertained based on the satisfaction of the so-called double-barrelled test will require the careful application of the relevant rules to the facts of the case. The same may be said of a finding that the claim failed on leg of the test, while satisfying the other.

Assume now that a present tribunal takes on such point as a precedent. Is the argument from consistency affected by the fact that the tribunal entertained, rather than dismissed, the claim? It is submitted that it is not—indeed, why should it?<sup>86</sup> The possibility of it being an inappropriate use of precedent is dependent on the rules determining its application. In this regard, Paulsson provides a useful, if perhaps involuntary, comparison between the statements made in the *Saipem* award with that of the Appellate Body in *Stainless Steel*.<sup>87</sup> One speaks of a duty to adopt ‘solutions established in a series of consistent cases’, whereas the other, quoting the first, refers to one to ‘resolve the same legal question in the same way’. Accepting this admittedly fragile semantic distinction, it is not difficult to see that the decision on a legal question may very well not be decisive for the solution of a case. A similar line of reasoning was followed in *Judgement No. 333*, where the Court qualified a passage of the judgment to be reviewed as an *obiter*. In his landmark study on precedent, Shahabuddeen takes the statement as evidence of the fact that the Court is capable of drawing the distinction, but—crucially—omits to comment on the fact that it went on to say that the qualification of a statement by the UN Administrative Tribunal as *obiter* did not ‘affect the duty of the Court to consider whether this ground of objection is or is not well founded’.<sup>88</sup> To be sure, the Court was giving an advisory opinion, and functioning almost as an appellate jurisdiction with a broad mandate to establish whether the Tribunal erred ‘on a question of law relating to the provisions of the Charter’—a point that the Court interpreted as including any element addressed in the decision, whether dispositive in its effect or not.<sup>89</sup> But it is possible to find in this approach support for the proposition made above. In other words, statements made *obiter* do not have less legal importance. They are, at the very least, indicia

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<sup>86</sup> Compare this point with the discussion in *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012. It is quite possible that the choice for a narrow view of holdings may have been inspired by the general understanding of the scope of the *res judicata* principle in jurisdictional matters. Consider, for example, the dissenting opinion of Judge Tanaka in *South West Africa*, Second Phase, Judgment, ICJ Reports 1966, p. 6, at 261. (‘The effect of *res judicata* concerning a judgment on jurisdictional matters must be confined to the point of the existence or otherwise of the Court’s jurisdiction.’) See also Judge Morelli’s dissent in the same case (at 59).

<sup>87</sup> *Saipem SpA. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, para 90; Appellate Body Report, *US – Stainless Steel*, WT/DS344/AB/R, 30 April 2008, para 160.

<sup>88</sup> *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1987, 51, para 86.

<sup>89</sup> Judge Schwebel, however, dissented on the grounds that the Court had allegedly failed to do so: see *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1987, 51, at 109-110 (Dissenting Opinion of Judge Schwebel).



that a court will resolve that legal question in the same or a similar manner in the future—all the more reason for the Court to review the correctness of the solution.

The reality is not—rather, not simply—that the distinction between ratio and obiter is difficult to justify in international adjudication for a lack of positive sources mandating it. The problem is that it is also difficult to draw, and ultimately bound to get diluted in the argumentative process consummated before and within the subsequent adjudicator, which will, whatever the precedent court might have done to avoid misunderstandings, provide its own reconstruction of what amounts to ratio or obiter, not being bound by even the most expression qualification.<sup>90</sup> It is doubtful that canons of statutory constructions may be readily applicable to precedents.<sup>91</sup> In these regards, Komárek's theory of reasoning with previous decisions provides a useful frame of reference.<sup>92</sup> In his view,

[L]awyers (judges and lawyers alike) often use judicial decisions in a way that resembles reasoning based on legislated texts. The idealized common law theory views that practice with suspicion and fails to acknowledge its legitimate place among the methods of legal reasoning.<sup>93</sup>

According to Komárek, the application of the categories of the common law to the much broader question of the use of previous decisions overlooks the fact that there exists no methodological monopoly on the issue. And, indeed, it is possible for courts to approach the issue of precedent in a different way, both in the backward-looking and the forward-looking dimensions of precedent. In the former, the attention shifts from the rule *as applied* to the rule *as stated*. In the latter, the drafting of a decision effects and encourages—but does not necessarily mandate—the future use of precedents as almost-statutory material by the adoption of rather abstracts language and a less precise focus on the facts of a case.<sup>94</sup> What a court says has the potential for universalization.<sup>95</sup>

A comparison with the Italian legal system, which offers a different approach altogether, may also be of assistance. The *Suprema Corte di Cassazione* enjoys very limited control on its docket—certainly nothing akin to a *jus of certiorari*—and deals yearly with some tens of thousands of cases, compared with the eighty or so opinions delivered by the US Supreme Court in the same time frame. To make matters more complicated, it is split in different *sezioni*, each managing qualitatively different caseloads and often overlapping in competence. To preserve its 'nomofilactic' role, an office exists at the Court whose function is to examine the overwhelming amount judgments delivered yearly and extract the 'maxim' (*massima*) that they are based on. Note that a 'maxim' is not the same thing as a headnote, and most certainly is not the same thing as a *ratio*: rather, it can be extracted from all elements of a decision, so long that they can be

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<sup>90</sup> Recall Lord Asquith: 'The law is simple. If you agree with the other bloke, it's part of the ratio; if you don't agree, it's part of the obiter, with the implication that he's a congenital idiot'. 'Some Aspects of the Work of the Court of Appeal' (1950) 1 *Journal of the Society of Public Teachers of Law* 350, 350; (Quoted in Duxbury [n 16] 90); and Douglas (n 9). See also Schauer (n 15) 580; Gleider I Hernández, *The International Court of Justice and the Judicial Function* (OUP Oxford 2014) 173.

<sup>91</sup> Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths 1985) 123 ff.

<sup>92</sup> Komárek (n 17).

<sup>93</sup> *ibid* 170.

<sup>94</sup> *ibid* 158–9.

<sup>95</sup> Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) 146 ('Many judgments even appear to be candidly geared towards providing an authoritative reference point for future discourse by crafting general and abstract formulations.').

universalised in an abstract rule.<sup>96</sup> To be sure, the *Cassazione's* nomofilactic function finds specific support in Italian law,<sup>97</sup> and its hierarchical supremacy and embeddedness in a unified judicial system may provide additional grounds in support of this specific role.<sup>98</sup> There may also be something to be said, it is acknowledged, about the mediating function of the *Ufficio del Massimario*, which might easily be denounced as glorified academic commentary or codification unshackled from the bounds of the judicial function. Yet, though many an objection could be levelled by a common lawyer, this imperfect analogy need only serve to illustrate that *it is indeed possible* to find guidance, and even normative authority, in prior decisions without being overly drawn to the *ratio/obiter* distinction.

## **B. *Ratio* and *obiter* as convenient argumentative and justificatory devices**

And yet, separating *ratio* and *obiter* is convenient for at least one reason: the leeway that it provides for the act of distinguishing. As mentioned above, distinguishing is a paradigmatic example of a manifestation of power—a proper claim to independent and separate normative authority—masquerading as unobjectionable intellectual exercise.<sup>99</sup> To the extent that precedents may create or reproduce something having certain features of abstract legal rules,<sup>100</sup> confining this capacity to *rationes* is an effective way to limit this tendency, at least at the quantitative level. When there is a rule of practice mandating adherence to precedent, such an approach may not surprise. When adherence to precedent is predicated on its persuasiveness, the argument is not convincing. In international law, where the use of previous decisions follows—*rectius*: it is purported to follow—a specific type of regulation under the model of Article 38(1)(d), the approach enjoys even less cogency.

The truth, one may be inclined to conclude, is that a plea for the application of the *ratio/obiter* distinction is not so much a failure to understand approaches different from one's own tradition,<sup>101</sup> but rather no more than a rhetorical and argumentative device employed to undermine the value of an authoritative statement. It is in this light that one of Shabtai Rosenne's recommendation to international lawyers, advising that the 'absence from international law of any rule of stare decisis means that the lawyer should be careful before relying on its ancillary doctrine of the distinction between the *ratio decidendi* and any

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<sup>96</sup> Michele Taruffo and Massimo La Torre, 'Precedent in Italy' in Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: A Comparative Study* (Ashgate/Dartmouth 1997) 147–8; For a more thorough discussion, see Michele Taruffo, *Precedente e Giurisprudenza* (Editoriale scientifica Napoli 2007); See also a theoretical appraisal in Siltala (n 32) 129.

<sup>97</sup> Article 65, Royal Decree 30 January 1941, n. 12.

<sup>98</sup> Considering the disconnect between the *ratio* and the need to determine a question of law with broader implications, consider the fact that, in overruling precedent, the US Supreme Court's voting record is often oddly skewed. As noted by Brenner and Spaeth, the votes to overrule a precedent are not necessarily the same that ultimately carry the day in the resolution of the controversy at issue: one such scenario unfolded in *Planned Parenthood v Casey*, 505 U.S. 833 (1992). See Saul Brenner and Harold J Spaeth, *Stare Indecisus: The Alteration of Precedent on the Supreme Court, 1946-1992* (Cambridge University Press 1995) 20.

<sup>99</sup> But see Duxbury (n 16) 114 (holding that '[t]he judge who tries to distinguish cases on the basis of materially irrelevant facts is likely to be easily found out. Lawyers and other judges who have reason to scrutinize his effort will probably have no trouble showing it to be the initiative of someone who is careless or dishonest, and so his reputation might be damaged and his decision appealed'); Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001) 43 (seeing this power as created by the very process of case analysis).

<sup>100</sup> For a negative view see Grant Lamond, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1.

<sup>101</sup> But consider the following observation by Jennings: 'I do not understand why a technique found essential in a system of strict precedent should thereby be disqualified from assisting in a less strict system; indeed, I would have supposed it even more useful in a system founded on the idea of a jurisprudence, which I take is a system that looks for a run of like decisions': Jennings (n 24) 12.

*obiter dicta*,<sup>102</sup> may be understood. Unpacking the rather dense statement, the question is not one of doctrine, but one of rules of relevance and authority—provided, of course, that they exist.<sup>103</sup>

Naturally, one could start from the assumption that prior decisions are simply neither binding nor (necessarily) persuasive. Yet, even overlooking normative indications that the application of precedent is not at all optional, this would amount to throwing out the baby with the bath water, as the argumentative value of precedent would be entirely lost. In short, this is but a ‘convenient distinction’,<sup>104</sup> one that allows for having it both ways. It is not, however, a costless one: once introduced, it becomes part of the argumentative vocabulary of dispute settlement by—and, most importantly, before—the adjudicator. In other words, it allows an adjudicator’s constituency to criticize it with its own techniques.<sup>105</sup>

### C. Against judicial minimalism: Positive externalities of *dicta*

Mentions of judicial minimalism frequently recur in the discussion of the international judicial function. To restate the argument, the idea is that a minimal decision will ward off fears of judicial overreach, and will also be less likely to offer a pretext for activist judges in the future. (The latter point, with respect, sounds like the ‘they dress provocatively’ argument.) The fact remains, however, that there is quite a lot to be said about the positive externalities of an exhaustive judicial decision.

Indeed, judicial minimalism often appears to be as a paradigmatic example of false economy. Similar views have been advanced in individual opinions of ICJ judges. Judge Lauterpacht observed in *Norwegian Loans* that though ‘[t]here may be force and attraction in the view that among a number of possible solutions a court of law ought to select that which is most simple, most concise and most expeditious... such considerations are not, for this Court, the only legitimate factor in the situation’.<sup>106</sup> The passage was quoted and endorsed in Judge Gaja’s declaration in *Marshall Islands*: in his view, the fact that the Court had decided, having dismissed the Applicant’s case on the grounds that there was no dispute, to avoid pronouncing on the other objections raised by the respondent States was a false application of judicial economy. As he put it, ‘judicial economy may also require the Court to take a decision on certain issues that were raised by the respondent States and which are likely to have to be litigated again in new proceedings between the same Parties, when these proceedings are a distinct possibility’. In a similar vein, a far more minimalist adjudicator such as the WTO Appellate Body has argued against ‘false judicial economy’, espousing a view that places emphasis not just on the resolution of a dispute, but on the *positive resolution of a dispute*, a goal to be accomplished by enabling the DSB ‘to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings... to the benefit of all Members’.

A second point that should be considered is the potential that *dicta* have as a channel of communication between a judicial body and its constituency. This is not the general reading of the practice of issuing *dicta*, but it is a legitimate one. As an example, it is possible to follow Fuad Zarbiyev’s reading of the *Barcelona Traction dictum* on *erga omnes* obligations, which, though wholly unnecessary to the resolution of the case,

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<sup>102</sup> Shabtai Rosenne, *The Perplexities of Modern International Law* (M Nijhoff 2004) 69.

<sup>103</sup> *ibid* 45.

<sup>104</sup> Bing Bing Jia, *International Case Law in the Development of International Law* (Martinus Nijhoff 2017) 270.

<sup>105</sup> A similar argument is made in Gao (n 79) 24.

<sup>106</sup> I.C.J. Reports 1957, p. 36.

was likely envisaged—at least partly—as a response to societal preoccupations in the wake of the rather unpopular 1966 *South-West Africa* Judgment.<sup>107</sup> Similar considerations could easily be applied to the Court's *dictum* in *Arrest Warrant*, where it was stressed, though ultimately without consequence for the operative part of the judgment, that 'immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity'.<sup>108</sup>

Finally, there is the question of law-making. The idea that international courts and tribunals can and do make law is not really open to challenge in academic circles—the difference in various lines of reasoning can be measured in the number of indirect steps to be taken to reach the very same conclusion—, although it is certainly true that the process is less automatic in some cases than some approaches would have us believe.<sup>109</sup> Although international lawyers generally scorn the idea of judicial legislation, they are usually appreciative of the idea of judicial *development*, a term with a long history and many meanings.<sup>110</sup> Leaving aside the many learned discussions on this point, the point to be considered is that the immediate effect of a judicial decision binding two parties and published is to resonate in front a specific audience and clarify the law for all. This point is particularly significant when it is considered in the context of situations where occasioning legal change—or even obtaining a binding interpretation of the law—can be particularly complex: any agreement has the potential to be better than no agreement, and the clarification of rules has measurable economic benefits for all actors.<sup>111</sup> In the WTO context, it is remarkable that comparatively few voices should have highlighted the rather strong textual argument present in Article 3.2 of the DSU: 'The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.<sup>112</sup>

In this context, it is, once again, clear that *dicta* have as much potential to shape the law as do *rationes*—or even more. The first reason is that *obiter* statements lend themselves to greater abstraction and generality and tend to have a more rule-like quality, cosmetically as well as substantively—an aspect that will be discussed in the next section. The second follows from the fact that things have a tendency to become more disturbing when they have actual implications. *Dicta*, as discussed, run parallel to the reasoning occasioning the decision, but can be dispensed with if need be, and are not easy to challenge in annulment or appeal proceedings *precisely* because they are not decisive.

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<sup>107</sup> Fuad Zarbiyev, 'Judicial Activism in International Law—A Conceptual Framework for Analysis' (2012) 3 *Journal of International Dispute Settlement* 247, 276.

<sup>108</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, at 25, para 60.

<sup>109</sup> For a reasoned critique see Niels Petersen, 'Lawmaking by the International Court of Justice – Factors of Success', *International Judicial Lawmaking* (Springer, Berlin, Heidelberg 2012) <[https://link.springer.com/chapter/10.1007/978-3-642-29587-4\\_13](https://link.springer.com/chapter/10.1007/978-3-642-29587-4_13)> accessed 11 October 2017.

<sup>110</sup> Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013) 206 ('A shorthand way of describing this phenomenon is 'judicial lawmaking', but a more apt description is of a court acting as an 'agent' in the development of international law').

<sup>111</sup> However, this can also lead to attempts to capitalise on legal change when there is a significant investment to do so. See Pelc (n 8) 563.

<sup>112</sup> Giorgio Sacerdoti, 'A Comment on Henry Gao, "Dictum on Dicta: Obiter Dicta in WTO Disputes"' (2018) 17 *World Trade Review* 535, 3, arguing that '[t]he function of "clarification" goes beyond a narrow approach in deciding on an individual case'.

#### D. Textualization and decontextualization of international precedent

Decisive or not, these statements survive: they become text. Recall the evolution of the theory of precedent in England: the declaratory theory and the rise of positivism went hand in hand. One may think of Lord Mansfield's observations that '[t]he reason and spirit of cases make law; not the letter of particular precedents',<sup>113</sup> or Blackstone's partition of the law of England in *lex scripta* (statute law) and *lex non scripta* (custom and common law),<sup>114</sup> does bear some degree of similarity. In landmark article, the late Peter Tiersma voiced his scepticism as to whether the distinction could still apply after centuries of law reporting, and further observed that American law—but there are reasons to apply the claim beyond specific borders: is international customary law not the paradigmatic example of a *norme sans texte*?<sup>115</sup>—was becoming increasingly 'textualized'—that is to say, hinging on what judges wrote, rather than what they thought, or said during the proceeding.<sup>116</sup> He observed that, in most cases, 'the judge writing for the majority will often specify exactly what the holding is in carefully crafted text that is meant to fetter the discretion of lower courts in the same way that a statute does'. This change had significant consequences, including the replacement, actual or at least potential, of legal reasoning with close reading and, most specifically, the shift from a system of case law to a system of 'opinion law'.<sup>117</sup> Tiersma made a few examples: verbatim repetition of specific expressions; string citations; specific signalling of holdings; overt codification of rules, and their naming after 'very brief snippets of authoritative text'.<sup>118</sup> Though he focused on American law, there is no doubt that these examples will sound familiar to anyone who engages in the analysis of the decisions of international adjudicators.

##### 1. Textualization: Who, when, and why it matters

Textualization tells us something about the perception of the authority of international adjudicators. On the self-reflective level, this is about international adjudicators writing and using judgments. For other actors, this is about using judgments argumentatively. Think of international lawyers—from budding ones writing a midterm paper to academics, counsel, and clerks of senior international judges—engaged in the daily practice of mining an online database to find support for a proposition in a judgment that so conveniently states their vesting it with the officiality of judicial authority.<sup>119</sup> Although international lawyers' fascination for the words of international judges is, in and by itself, one of the key drivers of the

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<sup>113</sup> *Fisher v. Prince* (1762) 3 Burr 1363.

<sup>114</sup> William Blackstone, *Commentaries On The Laws Of England* (Clarendon Press 1765) 63.

<sup>115</sup> Alain Papaux and Eric Wyler, 'Droit International Public Libre de Ses Sources Formelles: Nouveau Regard Sur l'Article 38 Du Statut de La Cour Internationale de Justice, Le Studies' (2013) 46 *Revue Belge de Droit International / Belgian Review of International Law* 525, 569.

<sup>116</sup> Peter M Tiersma, 'The Textualization of Precedent' (2006) 82 *Notre Dame Law Review* 1187, 1188. It must be pointed out, if only for the record, that Tiersma's concerns were hardly unique, and ultimately follow a line of thought that may be traced back to Oliphant's concerns with what he termed 'stare dictis'. See Oliphant (n 11).

<sup>117</sup> Tiersma (n 116) 1248.

<sup>118</sup> *ibid* 1261; See also Judith Stinson, 'Why Dicta Becomes Holding and Why It Matters' (2010) 76 *Brooklyn Law Review* 256–7 (considering the significance of the Bluebook rules of citation for the phenomenon); Consider, in a similar vein, the ability of courts to output lists of situations that might fall in the purview of a given standard. See Alex Stein and Gideon Parchomovsky, 'Catalogs' [2015] *Faculty Scholarship* 165.

<sup>119</sup> See also Andrew Michaels, 'The Holding-Dicta Spectrum' 59.

textualization phenomenon,<sup>120</sup> the point is that for many actors it has become much easier to attach importance to the text, rather than the outcome of a case. Comparing the Oxford Reports on International Law (or the EUR-Lex database) and Stuyt's *Survey of International Arbitrations*,<sup>121</sup> it becomes apparent that stress on outcome, rather than reasoning—or text—makes it difficult to find one quotable soundbite.<sup>122</sup> The facility with which text can be accessed removes some of the risks traditionally associated with 'headnote positivism', but it does import new ones.

The worship of the text—or 'textolatry'<sup>123</sup>—amplifies the ouroboric dimension of the relationship between a permanent court and its constituency. The text, not the finding, is the best instrument to advance their claim to normative authority. The malleability of texts—the judgment—and events—the resolution of a dispute—differs by orders of magnitude. The interpretation of facts encounters harder limits than that of texts, especially when there exists identity (even as a matter of degree) between the author of the text and the actor that must rely on it. In the case of international courts and tribunals, the control on the text, already inherent in authorship,<sup>124</sup> is also amplified by the circumstance that they alone are entitled to interpret their output,<sup>125</sup> while—contrary to the case of, say, treaty or statutory interpretation—there is a shortage of interpretive canons concerning judgments.

It may be recalled that Ingo Venzke's application of semantic pragmatism to the practice of international courts and tribunals reaches similar conclusions.<sup>126</sup> It is through words, not deeds, that courts can advance their semantic authority: clearly such advancement can come about through the interpretation of a treaty text, but this is hardly the only way to do so. Adjudicators have understood from an early phase that this objective was better accomplished by engaging with the past in a certain way, and, specifically, eschewing the idea of precedent as an example of 'how a life situation been resolved in the past so that the case *sub judice* could matched with these examples of earlier decision making', but rather 'a rulelike pronouncement of higher authority, the facts of the case stripped to their shadows'.<sup>127</sup> Indeed, as the following subsection demonstrates, this is how precedents are most commonly cited by international adjudicators. Fitzmaurice's observation that 'a decision is a fact: an opinion, however cogent, remains an opinion' is thus subject to an interesting twist: the practice of international adjudicators shows that either facts have a little role to play or decisions are taken as 'facts' in their entirety.<sup>128</sup>

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<sup>120</sup> Jean D'Aspremont, 'ESIL Reflection: If International Judges Say So, It Must Be True: Empiricism or Fetishism? – European Society of International Law | Société Européenne de Droit International' <<http://esil-sedi.eu/?p=3797>> accessed 9 June 2018.

<sup>121</sup> AM Stuyt, *Survey of International Arbitrations 1794–1938* (Springer 2013).

<sup>122</sup> The more primitive stage of development in the field of international commercial arbitration could be another test case.

<sup>123</sup> Vilém Flusser, *Towards a Philosophy of Photography* (Reaktion Books 2013) 12.

<sup>124</sup> The fact that in courts with varying composition authorship might mediated does not change much.

<sup>125</sup> See Article 60 of the ICJ Statute: Article 60, providing that '[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party'.

<sup>126</sup> See Ingo Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 99, 115.

<sup>127</sup> Mirjan R Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press 1991) 18 ff.; Cited in Komárek (n 17).

<sup>128</sup> Gerald Gray Fitzmaurice, 'Some problems regarding the formal sources of international law', *Symbolae Verzijl: Présentées au professeur J.H.W. Verzijl à l'occasion de son 70e anniversaire* (Nijhoff 1958) 172.

## 2. Pitfalls of textualism: Decontextualization

The problem is that one such approach does not come without dangers, the most significant being decontextualization. Consider the following example: a mathematician writing on the topic of boundary functions finds support for a proposition in the 1960s papers of a Ted Kaczynski. Should she acknowledge the fact that the author is the ‘Unabomber’? If she does not, it can be said that she is removing the context—or, at least, *a* context. Though this context should not bear any relevance on the argument she wishes to make, even if, from the perspective of argumentation, it can be problematic because of the idea that ‘[e]vil associations jeopardize relics’,<sup>129</sup> and the leeway it gives for a *reductio ad hitlerum* counterargument.<sup>130</sup> Consider, next, the use of string quotations by creationists. There exists a whole strand of literature that engages with and exposes the methodologies of pseudoscience. Starting with Dobzhansky’s 1973 landmark essay, a number of works by evolution-deniers have been found to hinge on the careful juxtaposition of quotations that, *once isolated by their context*, can support their claim.<sup>131</sup> In this case, decontextualization is much more underhanded. By doing so, creationists manage force the text enough to provide a solid basis for an argument from authority—and, what matters most, an authority that their opponent respect. This amounts to a brazen logical fallacy, one of misrepresented authority.<sup>132</sup>

Consider, in this light, the common criticism levelled at the European Court of Justice for its tendency to casually add a number of string references confirming the validity of settled law, ritualistically repeat formulae without connecting them to the facts of the case, and only very rarely engage with precedents substantively.<sup>133</sup> The ECJ has been further criticised for creating propositions and formulae by juxtaposing quotations taken liberally from previous judgments as if they were LEGO bricks.<sup>134</sup> Note that such

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<sup>129</sup> David Lowenthal, *The Past Is a Foreign Country - Revisited* (Cambridge University Press 2015) 544.

<sup>130</sup> Leo Strauss, *Natural Right and History* (University of Chicago Press 1965) (‘a view is not refuted by the fact that it happens to have been shared by Hitler’). A similar approach would also be problematic from the perspective of virtue ethics. See Jan Klabbers, ‘Law, Ethics and Global Governance: Accountability in Perspective’ (2013) 11 *New Zealand Journal of Public and International Law* 309; Kirsten Ainley, ‘Virtue Ethics’ [2017] *Oxford Research Encyclopedia of International Studies* <<http://internationalstudies.oxfordre.com/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-107>> accessed 16 June 2018.

<sup>131</sup> On the use of out-of-context string citations by creationists see Theodosius Dobzhansky, ‘Nothing in Biology Makes Sense except in the Light of Evolution’ (1973) 35 *The American Biology Teacher* 125; Daisie Radner and Michael Radner, *Science and Unreason* (Wadsworth 1982) 48 (holding that ‘[p]seudoscientists often reveal themselves by their handling of the scientific literature. [...] They focus on words, not on the underlying facts and reasoning’); For an excellent discussion of the potential of decontextualization see Matthew S McGlone, ‘Contextomy: The Art of Quoting out of Context’ (2005) 27 *Media, Culture & Society* 511.

<sup>132</sup> Douglas Walton, *Appeal to Expert Opinion: Arguments from Authority* (Penn State Press 2010) 258.

<sup>133</sup> Anthony Arnall, ‘Owning up to Fallibility’; Precedent and the Court of Justice’ (1993) 30 *Common Market Law Review* 247, 1952; Mattias Derlén and Johan Lindholm, ‘Is It Good Law? Network Analysis and the CJEU’s Internal Market Jurisprudence’ (2017) 20 *Journal of International Economic Law* 257, 642; Marc Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press 2014) 100 ff.

<sup>134</sup> JACOB (N 133) 95.

practices are not unique to any court,<sup>135</sup> nor are they the exclusive purchase of adjudicators, being rather common in the arguments of those who plead before them.<sup>136</sup>

It is not the intention of the present writer to compare the ECJ to either the Unabomber or evolution-deniers. Yet, even if the practice is not abused, the point remains that relying on string citations does not provide maximum clarity as to the scope and effect of the precedent cited.<sup>137</sup> It is a legitimacy-enhancing device, but a relatively shallow one, establishing—at best—a rebuttable presumption of correctness,<sup>138</sup> but also likely to undermine the very persuasiveness of a decision by reducing it to an instance of that ‘tonorial and agglutinative’ writing with which Cardozo so often took issue.<sup>139</sup> Above all, it can also engender unease and confusion for the parties, who are left to deal with the consequences of the decision without having been given, if not only formally, reasons that would qualify as truly satisfactory if Lord Bingham’s criteria were to be strictly applied.<sup>140</sup> String citations and scant engagement not just with the past, but with its meaning, may reveal an eisegetic approach to the justification of a legal claim. Ultimately, it is but another channel to assert normative authority.

This approach is problematic for a number of reasons, and may be especially ill-advised when it comes to international adjudication because it does not start from an overly realistic understanding of how collegiate bodies take their decisions,<sup>141</sup> especially in conflicted cases where these are ultimately drafted by ‘shifting groups of judges representing shifting majorities’ and the *motifs* are but the result of compromise.<sup>142</sup> Greater care might be needed, as text sticks from the very moment it is let out, and may only with difficulty be put it back in the box: the jurisprudence of the ICJ on questions of interpretation or *res judicata*, with all the difficulties arising from the difficulty of deciding what has been decided, is testament to significance of this concern.

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<sup>135</sup> Consider the treatment of the *Metalclad* expropriation analysis in *CMS*, where the tribunal simply cherry-picked the words that worked best for its goals. See *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para 262. Consider, further, Judge Schwebel’s dissenting opinion in the jurisdictional phase of the *Nicaragua* case, where he accused the Court of engaging in a clumsy attempt to come to terms with the legacy of *Aerial Incident* on a rather shaky basis. As he argued, ‘[t]he most one can do in Nicaragua’s support is to take out of context a few passages, notably, as the Court does, a single sentence found on page 142 of the Judgment’. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392, at 581, para 30 (Dissenting opinion of Judge Schwebel).

<sup>136</sup> Consider the recent case *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Public sitting held on Wednesday 29 August 2018, at 10 a.m – verbatim record, statement of Professor Pellet on behalf of Iran, p. 12 (‘Les Etats-Unis font une lecture très sélective de la jurisprudence de la Cour qu’ils invoquent à l’appui de ces affirmations, dont la robustesse n’a d’égale que la fausseté’).

<sup>137</sup> Tiermsa observes that English courts generally engage in longer citations than their American counterparts, signifying a more transparent approach in engaging with precedent (n 116) 1258.

<sup>138</sup> See Jacob’s discussion of C-137/09 *Marc Michel Josemans v. Burgemeester van Maastricht* (Second Chamber) [2010] ECR-I-13019.

<sup>139</sup> Benjamin Nathan Cardozo, *Law and Literature and Other Essays and Addresses* (FB Rothman 1986) 10.

<sup>140</sup> Justice Bingham, ‘Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award’ (1988) 4 *Arbitration International* 141.

<sup>141</sup> See generally Mohammed Bedjaoui, ‘The Manufacture of Judgments at the International Court of Justice’ (1991) 3 *Pace Yearbook of International Law* 29.

<sup>142</sup> SPIERMANN (N 53) 26.



### 3. Empirically testing the shift to textualization

How can we properly assess the shift to textualization? In the author's recollection, no study specifically attempted to test such kind of propositions. The closest attempt, in all likeness, is Sadl and Panagis's effort to empirically assess the whether the European Court of Justice treated precedents as a constraining force or, quite the opposite, as an argumentative springboard for change, building on the well-known Dworkinian distinction between the 'gravitational' and 'enactment' force of precedent.<sup>143</sup> In brief, the former is about the underlying principle of the precedent decision, which explains its ability to control merely analogous cases, on the formal justice-imbuend basis that like case should be treated alike;<sup>144</sup> the second is about the words used in a given precedent, which can thus only control what falls in the linguistic purchase of the words it uses.<sup>145</sup> A similar approach is adopted here: this section focuses on the most cited cases and paragraphs in the jurisprudence of two adjudicators, the ICJ and the WTO Appellate Body, in order to assess the extent to which they might demonstrate these citation patterns may support the claims made above.

It may be helpful to briefly summarise the approach adopted here. The availability of large collections of text allows for the quick parsing of all the paragraphs containing a citation. By using regular expressions,<sup>146</sup> it is possible to extract them and categorise them using a data structure that places them in context, matching any paragraph with the decision that contains it and the ones it cites, down to the specific paragraph or paragraphs that are mentioned, and with a reasonable degree of accuracy. When this methodology is applied to the ICJ and the WTO Appellate Body, it is possible to identify the most cited paragraphs cited by the two bodies, comparing their characteristics and tracking their use.

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<sup>143</sup> RM Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 110–123.

<sup>144</sup> *ibid* 116.

<sup>145</sup> Dworkin justifies the distinction (also) on the basis that only the gravitational force of precedent is based on the fairness of treating like cases alike. In the present author's view, the most useful critique to that argument is to be found in David Pannick, 'A Note on Dworkin and Precedent' (1980) 43 *The Modern Law Review* 36.

<sup>146</sup> These expressions are designed to match a 'pattern' and vary depending on the specific needs. For example, the ICJ tends to identify the cited decisions with a fairly consistent pattern, which includes, *inter alia*, the names of the disputing parties and the year and page of the reports in which they are published. In some cases, however, the Court makes observations between the name of the case and its citation in the reporter. Accordingly, the choice was made to collect only the latter. The most commonly employed regex for this purpose was the following:

```
((Reports\s\d+,|P\.C\.I\.J\.,\sSeries\s(A|B|C),\sNo\.\s\d+\D)\s)((p\.\s\d+,|s(para\.|paras\.)\s\d+)|p\.\s\d+)).
```

By way of comparison, for the Appellate Body, after converting official document numbers and full citations into short names, several regexes were employed, the structure being similar to what follows:

```
(?casename'(Appellate Body Report,\s)?Chile – Alcoholic  
beverages)(?:.*)\s(para\.|paras\.|footnote|fn|footnotes)\s(?:paragraph'((\d\.\d+)|(\d+)))====#{casename},  
#{paragraph}
```

For the use of similar methodologies, see Urska Sadl and Ioannis Panagis, 'The Force of EU Case Law: An Empirical Study of Precedential Constraint' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2787119 <<https://papers.ssrn.com/abstract=2787119>> accessed 24 March 2018; Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (2018) 29 *European Journal of International Law* 83.

Table 1: Appellate Body – The most cited paragraphs and Table 2: ICJ – The most cited paragraphs below, provide some answers. First, they show that both the Appellate Body and the ICJ have a marked tendency to rely on previous decisions for questions related on their procedure and, in general, their functioning. This point, in turn, may suggest an explanation for the second finding, which confirms that both the ICJ and the Appellate Body tend to use precedent in a rather ‘textual’ manner, employing prefabricated, tested formulations as argumentative building blocks and stringing them together in their output. This point is shown, with even greater clarity, by looking at how particular paragraphs have been treated over time. Two examples, taken from a much larger analysis, clearly show that there have been very few instances in which paragraph 267 of *Australia – Salmon* or page 74 of the *Interpretation of Peace Treaties* Advisory Opinion have been cited without a verbatim quotation.

There may be very good reasons for this approach. First of all, there are some hardly-deniable epiphenomenal factors, starting with the need of quickly disposing of issues that are likely to arise in many, if not virtually all cases. The identification of these factors may ultimately boil down to the specific function of a court—consider the need to establish an adjudicator’s original—or appellate—jurisdiction. Secondly, the psychological phenomenon whereby repetition legitimizes is a well-studied one,<sup>147</sup> and its effect on persuasion widely acknowledged.<sup>148</sup> It is easy to mark a connection between one such tool and the institutional resolve to enhance a Court’s legitimacy. It is also possible to simply ascribe the emergence of one such approach to the drafting process of judgments and reports, which may rely heavily on the assistance of the institution’s personnel and be affected by their relentless work,<sup>149</sup> but it is submitted that the conclusion remains unchanged. While this section does not propose to make sweeping claims as to whether international precedent has become ‘textualized’, it is submitted that the international adjudicators’ current practice of reasoning using previous decisions shows some symptoms that are consistent with one such shift.<sup>150</sup> In other words, a very large number of precedents are used to reiterate and bolster the authority of specific formulations,<sup>151</sup> rather than—or, at least, in addition to—to apply their outcome to a new case.

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<sup>147</sup> John T Cacioppo and Richard E Petty, ‘Effects of Message Repetition and Position on Cognitive Response, Recall, and Persuasion.’ (1979) 37 *Journal of personality and Social Psychology* 97.

<sup>148</sup> Robert E Burnkrant and H Rao Unnava, ‘Effects of Self-Referencing on Persuasion’ (1995) 22 *Journal of Consumer Research* 17.

<sup>149</sup> For a discussion of the process at the ICJ see Bedjaoui (n 141); With regards to the ECJ see generally Karen McAuliffe, ‘Precedent at the Court of Justice of the European Union: The Linguistic Aspect’ (2013) 15 *Law and Language: Current Legal Issues* 483 (discussing cultural, linguistic, and administrative factors leading to the adoption of a specific style of drafting and use of previous decisions).

<sup>150</sup> Kozel’s view of the ‘inclusive paradigm’ of precedent may also be consistent with these patterns. The idea is that ‘[c]ertain broad propositions that receive deference from future courts may plausibly be characterized as holdings that were logically necessary to the decisions that announced them’. See Kozel (n 41) 200.

<sup>151</sup> Consider the helpful discussion of the *tertium genus* of ‘catalogs’, which transcends the ‘rule and standards’ classification of legal commands, made by Stein and Parchomovsky (n 118) *passim*.

## A different outlook: Life in the realm of the text

Table 1: Appellate Body – The most cited paragraphs

PARAGRAPH	TOTAL TIMES CITED	CASES CITING	CONTENT <sup>152</sup>
1. US – WHEAT GLUTEN, PARA. 151	61	31	AB's appraisal of Panel's discretion on evidence
2. EC – FASTENERS (CHINA), PARA. 442	46	16	For a claim under Article 11 of the DSU to prevail, an appellant must identify specific errors regarding the objectivity of the panel's assessment
3. US – CARBON STEEL, PARA. 142	35	20	AB cannot 'base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached'.
4. EC – HORMONES, PARA. 132	32	22	Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.
5. CANADA – AIRCRAFT, PARA. 157	29	9	Interpretation of the term 'benefit'.
6. US – CARBON STEEL, PARA. 157	28	10	'[t]he nature and extent of the evidence required to satisfy the burden of proof will vary from case to case'.
7. US – CARBON STEEL, PARA. 127	25	11	'[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion'.
8. AUSTRALIA – SALMON, PARA. 267	25	18	Compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel.
9. AUSTRALIA – SALMON, PARA. 223	24	14	Panels 'are not required to accord to factual evidence of the parties the same meaning and weight as do the parties'.
10. EC – SARDINES, PARA. 299	23	17	Article 11 affords panels a margin of discretion in their assessment of the facts.

Table 2: ICJ – The most cited paragraphs

<i>Cited para</i>	<i>Times cited</i>	<i>Case citing</i>	<i>Content</i>
1. Reports 1950, p. 74	18	18	'Whether there exists an international dispute is a matter for objective determination'
2. Reports 1962, p. 328	16	15	In order to show that a dispute exists 'It must be shown that the claim of one party is positively opposed by the other'
3. Reports 1954, p. 32	15	11	The Court must not 'run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent'
4. P.C.I.J., Series A, No. 2, p. 11	14	14	A dispute is 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'
5. Reports 2001, p. 506, para. 109	17	17	'Orders on provisional measures under Article 41 [of the Statute] have binding effect'

<sup>152</sup> It must be observed that, especially in the context of WTO adjudication, paragraphs of Appellate Body reports may be quite lengthy and dense, with the result that more than one specific proposition may be extracted from each of them.

## A different outlook: Life in the realm of the text

6. Reports 1993, p. 345, para. 42	16	16	'The essential characteristic [of genocide] is the intended destruction of 'a national, ethnical, racial or religious group'.
7. Reports 1950, p. 71	12	9	Various <i>dicta</i> , including "[t]he Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused.'
8. Reports 1984, p. 437, para. 101	11	11	'ultimately ... it is the litigant seeking to establish a fact who bears the burden of proving it'.
9. Reports 1962, p. 155	11	6	'In accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter'.
10. Reports 1995, p. 100, para. 22	11	8	[the duty of an international tribunal is] 'not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not indicated in those submissions'

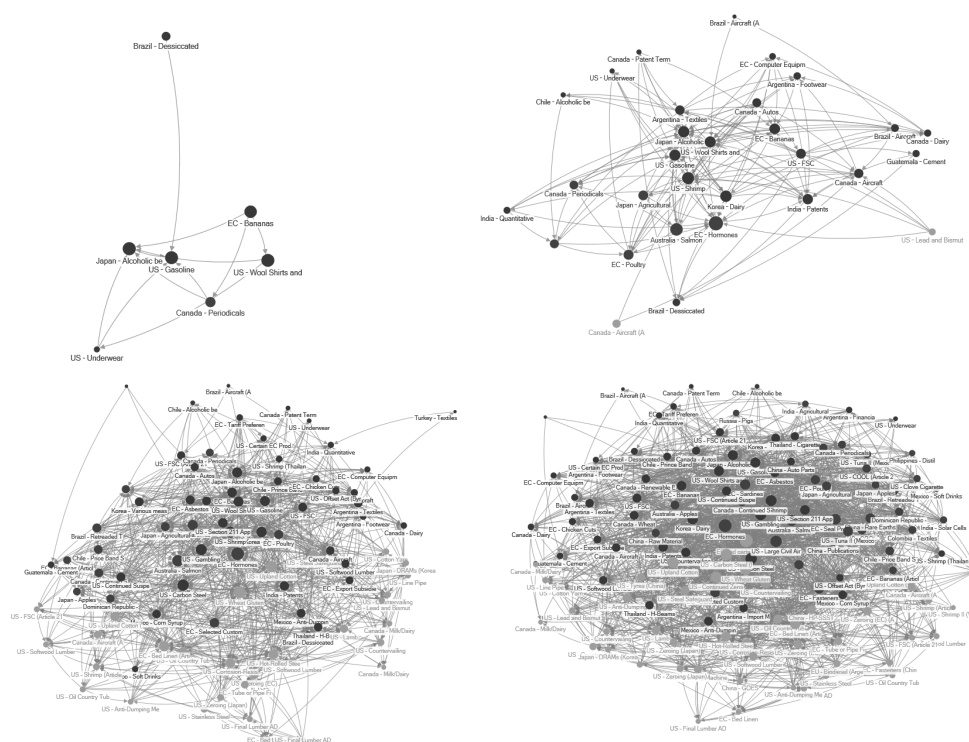


Figure 1: The evolution of the Appellate Body's citation network until 1998, 2002, 2008, and 2017 (based on the author's text-as-data analysis).

A different approach to the same problem is to focus on questions that have been expressly qualified by relevant actors as *obiter dicta*. It is tempting to start from Appellate Body Report that prompted the harshest blowback from the United States, *Argentina – Financial Services*, which was denounced for containing, after the reversal of the Panel’s findings on the question of likeness, 46 pages’ worth of *obiter dicta* on points that the Appellate Body itself qualified as moot. Although the case is relatively recent, it may be asked whether its allegedly many findings beside the point were picked up in later decisions. The question will have to be answered in the affirmative. The case has been cited in two subsequent Appellate Body Reports, which have, unsurprisingly, cited alleged *dicta*, down to the footnotes.<sup>153</sup> Paragraphs beyond the cut-off line identified by the United States have also made it in seven panel reports.<sup>154</sup>

Though the exercise would not be entirely pointless, it would be futile for our purposes to track the fortunes of any statement that may have more or less controversially qualified as *dicta*. What matters for this analysis is that it is possible to find instances in which statements on points that were demonstrably not necessary to the resolution of the case at issue were later relied on by the same and subordinate adjudicators. Once again, this tends to confirm the progressive shift towards a textualized understanding of precedent, which is encouraged by—and, at the same time, encourages—a degree of judicial maximalism.

#### **E. Can and should precedent be de-textualized?**

The obvious question, then, is the following: if precedent has become textualized, should it be de-textualized? And, if so, how? As the discussion on the positive externalities on precedent made above clarifies, it is difficult to take a stand on the first point. But, if we are to take a stand on the second, some possible techniques might be worth considering.

The first side of the coin is what to do to detextualize the *production* of precedents. In the study discussed above, Tiersma himself proposed a variety of strategies: for instance, he considered going back to the ‘golden age’ of the common law, where law reports amounted to the revised notes jotted down in court by a private reporter listening to the oral proceedings, thus making future reliance on specific text unlikely. It is unlikely that one such system could work well in international adjudication, where private reporting of decisions may be restricted by a number of factors: first, it would not be as lucrative; second, it is dubious that registries and secretariats, which are difficult to categorise as weak powers, would relinquish control on the output of the adjudications they administer; third, reasons of transparency would probably hinder one such approach. A variation to this model would be to require international adjudicators to deliver their judgments (and reasons) orally in public, thus satisfying the needs of transparency and publicity,<sup>155</sup> but discouraging the cult of text. This approach would perhaps strike a reasonable middle-ground between the current system and the one, inspired by ‘baseball arbitration’ and predicated on the lack of a duty of

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<sup>153</sup> Specifically, the following paragraphs of *Argentina – Financial Services* have been cited: para. 6.203 (five times); para. 6.205, para. 6.203 and fn 495 (twice); para. 6.202 and fn 505 to para. 6.208 (once).

<sup>154</sup> For example, Panel Report, *Indonesia – Measures Concerning the Importation Of Chicken Meat And Chicken Products*, WT/DS484/R, adopted 17 October 2017, para 7.127.

<sup>155</sup> For example, through webcasting. Consider, however, the low degree of success of such methods. See Esmé Shirlow, ‘Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration’ (2016) 31 ICSID Review - Foreign Investment Law Journal 622, 653.

reason-giving, which Joost Pauwelyn proposed for specific classes of international disputes.<sup>156</sup> All these models would have to rely on some kind of no-citation rule, as implemented in the American experience.<sup>157</sup>

There is a limit, however, to the directions that can be given to an adjudicatory body. It is thus on the reading of precedent that the bulk of the work has to be done. In the writer's opinion, from the perspective of adjudication, there is nothing extraordinarily wrong with reliance on the text. The considerations made *sub A* will thus apply, with the caveat that close reading will need to be coupled with *contextual* reading. From the perspective of the scholars engaged in the study of the practice of international courts and tribunals, however, there might be reasons to adopt different approaches. The phenomenon of textualization provides additional support for the case against adopting an excessively doctrinal model for the analysis of international jurisprudence, as in many cases a shift towards distant reading, as conceived in the study of literature and literary history,<sup>158</sup> can paint a more realistic picture of what is being done. Empirical approaches such as social network analysis applied to citation of precedent can be successfully employed to understand the aggregate of a phenomenon, as well as to restore context where it may otherwise appear lacking or mysterious.

## V. Conclusion: From disputes to the Holy Writ

[I]t is not sufficient to have enough Arabic to be able to read the words inlaid on the walls of the Taj Mahal. It is at least as important to grasp that these are quotations from a sacred work and to know which the work in question is. Anyone who failed to understand that would fail fully to understand the communicative purpose of the texts and their role in the design of Shah Jahan's building.<sup>159</sup>

The distinction between *ratio* and *obiter*, a rather technical aspect of one existing approach to precedent, does not work well in international adjudication, and it is mostly used as an argument to undermine the authority of prior judicial decisions, in continuity with in a long tradition that can be traced back at least to the *Lotus* case—*rectius*, the *Lotus dictum*.<sup>160</sup> Indeed, adjudicators have been mostly unreceptive of the distinction. By and large, permanent courts have been eager to rely on previous statements made *obiter*, as well as to reject the importance of the distinction when confronted with such an argument. Investment arbitration tribunals, too, have shared in international investment arbitration as well, where arbitrators adopt, although not to the same degree of their colleagues sitting on permanent benches, a rather generous approach towards the pronouncements of other tribunals.

There are some signals that a rule of precedent-recognition which accounts for a distinction between *ratio* and *obiter* may be developing at the international level. However, such a distinction is neither mandated

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<sup>156</sup> Joost Pauwelyn, 'Baseball Arbitration to Resolve International Law Disputes: Hit or Miss?' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3155363 <<https://papers.ssrn.com/abstract=3155363>> accessed 12 June 2018.

<sup>157</sup> William L Reynolds and William M Richman, 'The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals' (1978) 78 Columbia Law Review 1167; Salem M Katsh and Alex V Chachkes, 'Constitutionality of "No-Citation" Rules' 39; Jessie Allen, 'Just Words - The Effects of No-Citation Rules in Federal Courts of Appeals' (2004) 29 Vermont Law Review 555.

<sup>158</sup> Franco Moretti, *Graphs, Maps, Trees: Abstract Models for a Literary History* (Verso 2005); Franco Moretti, *Distant Reading* (Verso Books 2013); Bernadette Meyler, 'The Rhetoric of Precedent' in Austin Sarat (ed), *Rhetorical Processes and Legal Judgments* (Cambridge University Press 2016).

<sup>159</sup> Roy Harris, 'The Semiology of Textualization' (1984) 6 Language Sciences 271, 275.

<sup>160</sup> Compare the terminology adopted, for example, by SPIERMANN (N 53) 249.

by any rules on adjudication nor does it follow by necessary implication from the orthodoxy on the sources of international law. It remains an open question whether or not international adjudicators will become more receptive to one such approach, especially considering that enforcing it would be difficult with the existing systems of control—in fact, and not at all paradoxically, the contrary may be true.<sup>161</sup> It is much more likely that the practice may find disincentives in other actors in the system—such as states, arbitral institutions, and the community of arbitrators—taking issue with both drafting and decision-making. Of course, this kind of inherently social enforcement can be far more effective in international arbitration than in permanent international courts.

There is much to be said about the potential for *dicta* to be a positive externality of international adjudication. They allow for a clarification of the rules of law that may have been considered in a decision—even if that decision is ultimately taken on different grounds—and they form an important instrument in the adjudicator's toolbox. From the perspective of an adjudicator who happens to be situated somewhere down the timeline, there are very few reasons why a statement made *obiter* should be less relevant for the determination of rules of international law, insofar it still is an authoritative statement that leads to increased clarity, efficiency, and consistency (practical reasons).

Questions may undoubtedly arise whether a *dictum* appears to have arisen from nowhere, and certainly not from a sound confrontation with the parties. But it is submitted that the discussion of *dicta* in this context may be reconceived as one example in a broader phenomenon, that of textualization and decontextualization of precedent, which makes reliance on previous decisions problematic. A textualized precedent is far more likely to be employed out of context, through objectionable cut-and-paste techniques or otherwise.<sup>162</sup> The abundant evidence supporting the claim that international adjudicators may have been slowly shifting towards a use of previous decisions that cannot be described as strictly 'case-bound', but rather incorporates elements of the 'legislative model' described above, only adds to the uncertainty. It is for this reason that Roy Harris's plea may be recalled: for today's adjudicators, some knowledge of Arabic may not be enough.

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<sup>161</sup> William Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press 1992) 71.

<sup>162</sup> Jacob (n 133) 95–7.